LIBRARY
SUPREME COURT, U. S.

FILED
APR 20 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1195

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Petitioners,

—against—

MORTON EISEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM E. HAUDEK,
295 Madison Avenue,
New York, N. Y. 10017;

ROBERT ZICKLIN,
521 Fifth Avenue,
New York, N. Y. 10017,

Attorneys for Respondent.

Of Counsel:
POMERANTZ LEVY HAUDEK & BLOCK,
LAVENTHALL & ZICKLIN.

April 19, 1967.

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
REASONS FOR DENYING THE WRIT	2
I—The decision below, resting on the peculiar facts of this case, does not purport to lay down any general rule that might merit review by this Court	2
II—The decision below correctly applies the collateral order doctrine	3
1. The District Court's decision is a collateral order	4
2. A dismissal of respondent's appeal would forever prevent an appellate review of the District Court's order	5
(a) The expenses of this difficult litigation are too large to allow the prosecution of respondent's small individual claim to final judgment	5
(b) Even after a final individual judgment for respondent, appellate review of the District Court's order would be impossible or impractical	9
3. The District Court's power to change its decision pursuant to Rule 23(c)(1) and Rule 54(b) FRCP does not prevent an appeal under the collateral order doctrine	10
4. Respondent has standing to appeal	11
III—The decision below is not in conflict with any other Court of Appeals ruling	13

PAGE

IV—The petition raises no question concerning the proper construction of amended Rule 23 14

CONCLUSION 14

TABLE OF CASES

All American Airways v. Elderd, 209 F. 2d 247 (2 Cir. 1954) 12, 13

Bal Theatre Corp. v. Paramount Film Dist. Corp., 206 F. Supp. 708 (N.D. Cal. 1962) 7

Chabot v. National Securities and Research Corp., 290 F. 2d 657 (2 Cir. 1961) 7, 11

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3, 4, 5, 11, 13

Decorative Stone Co. v. Building Trades Council, 23 F. 2d 426 (2 Cir. 1928), cert. den. 277 U.S. 594 7

Escott v. Barchris Const. Corp., 340 F. 2d 731 (2 Cir. 1965), cert. den. sub nom. Drexel & Co. v. Hall, 382 U.S. 816 6

Finley v. Music Corp. of America, 66 F. Supp. 569 (S.D. Cal. 1946) 7

Fox v. Glickman Corp., 355 F. 2d 161 (2 Cir. 1965), cert. den. 384 U.S. 960 12

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 2, 3, 4, 11

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258 (M.D. Pa. 1965) 7

Hutchinson v. William C. Barry, Inc., 50 F. Supp. 292 (D. Mass. 1943) 8

Jumps v. Leverone, 150 F. 2d 876 (7 Cir. 1945) 13

Kalwar v. McKinnon, 152 F. 2d 263 (1 Cir. 1945) .. 8

PAGE

Lipsett v. United States, 359 F. 2d 956 (2 Cir. 1966) 12, 13
Local No. 438 v. Curry, 371 U.S. 542 (1963) 5
Lockwood v. Hercules Powder Co., 172 F. 2d 775 (8 Cir. 1949) 13
Mercantile Nat. Bank v. Langdeau, 371 U.S. 555 (1963) 5
Montague & Co. v. Lowry, 193 U.S. 38 (1904) 8
Oppenheimer v. F. J. Young & Co., 144 F. 2d 387 (2 Cir. 1944) 13
Osborn v. Sinclair Refining Co., 207 F. Supp. 856 (D. Md. 1962), rev'd on other grounds, 324 F. 2d 566 (4 Cir. 1963) 7
Roberts v. U.S. District Court, 339 U.S. 844 (1950) ..4, 7, 11
Rogers v. Alaska Steamship Co., 249 F. 2d 646 (9 Cir. 1957) 13
Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 8
Straus v. Victor Talking Machine Co., 297 Fed. 791 (2 Cir. 1924) 8
Swift & Co. v. Compania Colombiana, 339 U.S. 684 (1950) 5
Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d 731 (9 Cir. 1959) 7
Weeks v. Bareco Oil Co., 125 F. 2d 84 (7 Cir. 1941) .. 6

Statutes and Regulations

Clayton Act

§ 4, 15 USC § 15 7

Federal Rules of Civil Procedure

Rule 23 .....3, 6, 9, 10, *passim*
Rule 54(b) 10, 11

PAGE

Judicial Code

28 USC §1291 3

Rules of the Supreme Court of the United States

Rule 19(1)(b) 2

Authorities

Advisory Committee Notes to amended Rule 23
39 F.R.D. 98 et seq. 6, 9

3 Moore's Federal Practice (2d Ed. 1964) ¶ 23.11(3), p. 3465 12

6 Moore's Federal Practice (2d Ed. 1965) ¶ 54.31, pp. 235-7 11

Supreme Court of the United States

October Term, 1966

No. 1195

CARLISLIE & JACQUELIN and DECOPPET & DOREMUS, each limited partnerships under New York Partnership Law, Article 8, and NEW YORK STOCK EXCHANGE, an unincorporated association,

Petitioners,

—against—

MORTON EISEN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

Petitioners' statement, while generally accurate, erroneously questions the basis for the $70 estimate of respondent's individual damages (Pet. 7). In fact, respondent's answers to interrogatories (¶ 3)* show that he incurred "differential" charges aggregating about $259. Since the complaint attacks these charges only so far as they were excessive, the $70 damage estimate appears reasonable. The District Court itself described respondent's individual interest as comparatively "minuscule" (A8).

---

* The answers to interrogatories, although ignored by the District Court (see A6), were filed with the District Court on July 5, 1966, prior to the filing of petitioners' motion for a nonclass suit determination. A certified copy is being filed with this Court.

REASONS FOR DENYING THE WRIT

I

The decision below, resting on the peculiar facts of this case, does not purport to lay down any general rule that might merit review by this Court.

The Second Circuit correctly rested its appellate jurisdiction on the "collateral order doctrine", expounded and clarified by this Court in a long line of decisions culminating in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-4 (1964). As the decision below emphasizes (A15), appealability under that doctrine turns on a "practical rather than a technical construction" of the requirement of finality, on a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other" (*Gillespie*, 379 U.S. at 152-3).

This being the settled rule, its application depends on the exercise of practical judgment in relation to an infinite variety of circumstances presented from case to case. Such individual determinations are the task of the Courts of Appeals; if they observe the *Gillespie* standard of practicality, as did the Court below, there is no occasion for this Court further to settle "an important question of federal law" or to exercise its "power of supervision". (Rule 19(1)(b) of this Court).

Although the Court of Appeals based its decision on the peculiar circumstances of this case (the small amount of respondent's individual claim, the prohibitive expense of prosecuting it as such), petitioners (Pet. 19) would read the

decision below as permitting an immediate appeal from "any order" determining the nonclass character of an action. Precisely this kind of unwarranted generalization was rejected in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-7 (1949):

> "We hold this order [denying a motion for security] appealable [under the collateral order doctrine]. But we do not mean that every order fixing security is subject to appeal. Here it is the right to security that presents *a serious and unsettled question. If the right were admitted or clear* and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, *appealability would present a different question.*" (Emphasis added.)

The District Court order here appealed from (A1) presents "a serious and unsettled question" under the recently amended Rule 23 FRCP. It is this question which needs appellate resolution. To allow the present appeal establishes, therefore, no precedent whatever for appeals in other cases where the law may be "clear" (*Cohen, supra*) and the "danger of denying justice by delay" (*Gillespie, supra*) absent or insignificant.

II

The decision below correctly applies the collateral order doctrine.

While 28 USC § 1291 permits appeals only from "final" decisions of the district courts, the order need not be "the last order possible to be made in a case"; *Gillespie* (379 U.S. at 152). A decision otherwise interlocutory is appeal-

able as a "collateral" order if it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it"; *Cohen* (337 U.S. at 546-7). Later decisions of this Court have stressed practical considerations and a balancing of the drawbacks of piecemeal review against the danger of denying justice by dismissing the appeal; *Gillespie* (379 U.S. at 152-3). Respondent's appeal meets either test.

1. The District Court's decision is a collateral order.

Respondent's right to maintain this action as a class suit "is not an ingredient of the cause of action and does not require consideration with it." To sustain his cause of action, respondent must prove that the petitioner dealers restrained or monopolized odd-lot trading to his injury and that the petitioner Stock Exchange wrongfully failed to prevent this practice. None of the prerequisites of a class suit—such as the adequate protection of the class interests by respondent, the predominance of common over individual questions—has the slightest bearing on the merits of the cause of action. Respondent's claim may be well-founded even though there were no basis for a class suit; conversely, the action may lie as a class suit even though the claim were to fail. The class suit issue is thus truly "collateral" to the main controversy. This Court has treated issues much closer to the main controversy as collateral.*

---

* Thus this Court has permitted immediate appeals from pre-trial rulings:

Where the District Court, in an action for the death of a seaman, struck from the complaint all references to state statutes and precluded the plaintiff from recovering for the benefit of certain relatives, *Gillespie, supra* (379 U.S. at 152-4);

Where the District Court denied the plaintiff's motion to proceed in forma pauperis, *Roberts* v. *U.S. District Court*, 339 U.S. 844 (1950);

(footnote continued next page)

2. A dismissal of respondent's appeal would forever prevent an appellate review of the District Court's order.

Perhaps the most persuasive practical reason for permitting an immediate appeal under the collateral order doctrine arises where, after a final decision on the merits, "it will be too late effectively to review the present order and the rights conferred by the statute * * * will have been lost, probably irreparably"; *Cohen* (337 U.S. at 546). If respondent's present appeal were dismissed, any later review of the District Court's ruling would be effectively barred for two separate reasons.

(a) The expenses of this difficult litigation are too large to allow the prosecution of respondent's small individual claim to final judgment.

Although the District Court permitted respondent to proceed with his individual claims (A11), the Court of Appeals properly recognized that "no lawyer of competence is going to undertake this complex and costly case to recover $70 for Mr. Eiser" (A15). Unless respondent can appeal now, he will have to drop his individual action, so that "no appellate court will be given a chance to decide if this class action was proper under the newly amended Rule 23" (A15).

The obstacle facing respondent would equally confront any other buyer or seller of odd-lots. The odd-lot differentials amounted to 12½¢ per share on stocks selling below $40

(footnote continued)

Where the District Court vacated the attachment of the defendant's property, *Swift & Co* v. *Compania Colombiana*, 339 U.S. 684, 688-9 (1950);

Where the highest court of a state had sustained the state courts' jurisdiction, *Local No. 438* v. *Curry*, 371 U.S. 542, 548 (1963), or the propriety of the venue, *Mercantile Nat. Bank* v. *Langdeau*, 371 U.S. 555, 557-8 (1963).

and 25¢ per share on higher priced stocks (A2). Since each odd-lot transaction involves less than 100 shares, and since only the excessive portion of the differential is attacked, respondent's individual claim must inevitably be small; and the same is necessarily true, with only minor variations, of the individual claims of other class members. None of them could afford to sue just for his individual damages. A dismissal of respondent's appeal would thus be the "death knell" (A16) not just of this action, but of any similar claims by others. Respondents would enjoy complete immunity, no matter how illegal their conduct was.

Rule 23 is designed to guard against such a failure of justice. It is one of the great purposes of the class action to serve as a "device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. * * * there must be a practical method for combining these small claims, and the representative action provides that method." *Escott* v. *Barchris Const. Corp.*, 340 F. 2d 731, 733 (2 Cir. 1965), cert. den. sub nom. *Drexel & Co.* v. *Hall*, 382 U.S. 816; *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 90 (7 Cir. 1941). Hence it is that the *Advisory Committee Notes* to amended Rule 23 (39 F.R.D. 98, 104) favor class actions where "the amounts at stake for individuals may be so small that separate suits would be impracticable".

It was eminently proper for the Court of Appeals to give effect to this statutory purpose by taking jurisdiction of the appeal rather than relegating respondent to his individual claim and thus condemning the action—and, for that matter, any similar action—to unreviewable and irreparable failure. This disposition was in accord with the settled rule permitting an immediate appeal from district court orders

which would leave the plaintiff's claim theoretically intact but practically unenforceable, e.g., by denying a forma pauperis petition, *Roberts* v. *U.S. District Court,* 339 U.S. 844 (1950), or by requiring security in a prohibitive amount, *Chabot* v. *National Securities and Research Corp.,* 290 F. 2d 657, 659 (2 Cir. 1961).

Petitioners argue that respondent may secure competent counsel even for his minuscule individual claim because the "reasonable attorney's fee" recoverable by a successful anti-trust plaintiff under § 4 of the Clayton Act, 15 USC § 15, may exceed the amount of the damage recovered (Pet. 9-10). The argument rests on a single District Court decision, *Osborn* v. *Sinclair Refining Co.,* 207 F. Supp. 856 (D. Md. 1962), rev'd on other grounds, 324 F. 2d 566 (4 Cir. 1963), which awarded a $14,000 counsel fee for the recovery of trebled damages of $975. That case, however, described by the court itself as "unusual" (p. 864), runs counter to the overwhelming weight of the authorities, which will not allow counsel fees above a fraction of the amount recovered. In each of petitioners' remaining Clayton Act cases (Pet. 10), the counsel fee awards were substantially less than the treble damages recovered*; and the extensive tabulations in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 245 F. Supp. 258, 304 (M.D. Pa. 1965), and in *Bal Theatre Corp.* v. *Paramount Film Dist. Corp.,* 206 F. Supp. 708, 717 (N.D. Cal. 1962), show that fee allowances generally range from

---

* In one obviously erroneous decision, *Finley* v. *Music Corp. of America,* 66 F. Supp. 569 (S.D. Cal. 1946), the District Court awarded counsel fees to an *unsuccessful* plaintiff—contrary to the settled rule that counsel fees can be allowed only to a successful damage claimant; *Talon, Inc.* v. *Union Slide Fastener, Inc.,* 266 F. 2d 731, 739-40 (9 Cir. 1959); *Decorative Stone Co.* v. *Building Trades Council,* 23 F. 2d 426, 428 (2 Cir. 1928), cert. den. 277 U.S. 594.

about 8% to a high of 33% of the recovery.* The Second Circuit, in particular, considers the amount of the damage recovery so important that a reduction of the damages on appeal necessarily entails a reduction of the fee award; *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, 806 (2 Cir. 1924). Since respondent's individual recovery can only be minute, any reasonably foreseeable fee award under the Clayton Act is too insignificant to attract competent counsel.

Nor could respondent, after securing an individual judgment, seek a counsel fee award against "future litigants" similarly situated, as petitioners suggest (Pet. 10). The rule of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), is inapplicable since—apart from other obstacles**—a jury verdict here, finding restraint of trade or monopoly, could neither bind nor influence other juries in hypothetical future cases; the future litigants would thus derive no benefits from this action and could not be required to contribute to its expenses.

The Court of Appeals was thus correct in its assessment that, as a practical matter, respondent's chance of securing competent counsel for his small individual claim is nil, so

---

* In a small case, this Court has approved a 50% fee; *Montague & Co.* v. *Lowry*, 193 U.S. 38, 48 (1904) (recovery $1500, counsel fee $750). For other cases involving small amounts, decided under kindred statutes, see *Kalwar* v. *McKinnon*, 152 F. 2d 263 (1 Cir. 1945) (recovery $450, counsel fee $75 plus $25 for the appeal); *Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (recovery $321.90, counsel fee $100).

** Thus petitioners do not explain how the Court, lacking control of a "fund" such as in *Sprague*, could award fees against future litigants, when it is unknown whether any actions will be brought, by whom they will be brought, how many there will be and how much each will involve.

that the District Court order spells the end of the action and is, therefore, "final".

(b) *Even after a final individual judgment for respondent, appellate review of the District Court's order would be impossible or impractical.*

Assuming, for argument's sake, that respondent will proceed with his individual action and recover judgment for threefold his full individual damages, it is difficult to see how the District Court's nonclass suit determination could be effectively reviewed at that stage. Respondent's individual grievance having been redressed in full, he would no longer be a member of the class and could not serve as an adequate class representative for appeal purposes.

But assuming, arguendo, that even after final judgment in his favor respondent could somehow maintain an appeal from the District Court's nonclass suit order, what disposition would the Court of Appeals make if it should find that the action had been properly brought as a class suit? It could hardly rule that respondent's individual judgment shall inure to the benefit of the class; for under amended Rule 23(c)(3), the class can reap the benefit of a favorable decision only if it also has borne the risk of an adverse adjudication (see *Advisory Committee Notes* to amended Rule 23, 39 F.R.D. 105-6). Nor could the absent class members be foreclosed from urging a higher measure of damages than that sought and secured by respondent.* In short, the Court of Appeals would have no choice but to remand the case for notice to the class under Rule 23(c)(2), new pre-

* If, for instance, respondent should claim and establish that the "differential" charge was excessive by 30%, other class members, who were not notified of the action and had no opportunity to participate in the trial, should be free to argue for a greater percentage.

trial proceedings and a new jury trial. The result—an utter waste and senseless duplication of effort, expense and time—bears out the holding below (A15) that the often competing consideration of justice and efficiency here unite to sustain immediate appealability.

Further difficulties would pile up after the remand. Who would give the required notice to the class and conduct the new proceedings? Not respondent; his individual claim has, by hypothesis, been adjudicated and paid. Unless by chance some other class member volunteers to intervene, the class action will die even then because respondent was forced by the District Court's order to recover an individual judgment and thereby to eliminate himself as champion of the class.

Precisely to avoid such procedural entanglements, Rule 23(c)(1) directs that the class suit character of an action be determined "as soon as practicable after the commencement of [the] action". For exactly the same reason, the policy of the Rule and common sense require that an appeal from the determination be taken promptly since a review after final judgment could serve no useful purpose.

3. The District Court's power to change its decision pursuant to Rule 23(c)(1) and Rule 54(b) FRCP does not prevent an appeal under the collateral order doctrine.

Rule 54(b) provides (with an exception here irrelevant) that any interlocutory order "is subject to revision at any time" before the entry of final judgment as to all claims and parties. Rule 23(c)(1) confirms the application of this principle to class suit determinations. According to petitioners (Pet. 12-14), the principle renders the District Court's decision non-final and, therefore, not appealable.

However, the District Court's theoretical power to alter its nonclass suit determination is here practically meaningless. As shown, the Court of Appeals properly held that the dismissal of respondent's appeal would be the end of the action (A15-16). Since the District Court would thus have no opportunity to change its decision, its order has all the practical earmarks of finality.

More fundamentally, petitioners' argument would spell the end of the collateral order doctrine. District Court orders striking allegations of a complaint or denying a forma pauperis application or refusing to require security are all "subject to revision at any time"; yet this Court has consistently sustained immediate appeals from such orders, *Gillespie* (379 U.S. at 152-4); *Roberts* (339 U.S. 844); *Cohen* (337 U.S. at 545-7). The District Court's power to change a collateral order under Rule 54(b) (or, for that matter, under Rule 23(c)(1)) does not, therefore, prevent an immediate appeal; *Chabot, supra* (290 F. 2d 657, 659); 6 *Moore's Fed. Pr.* (2d Ed. 1965), ¶ 54.31, pp. 235-7.

Petitioners profess to apprehend that an appellate ruling sustaining the class suit might prevent the District Court from later modifying the character of the action even if newly developed facts should warrant a change (Pet. 18). The point is premature. The Court of Appeals may be trusted to safeguard the flexibility of the class suit determination. Should its decision unduly restrict that flexibility, it will then be time to seek corrective action by this Court.

4. Respondent has standing to appeal.

Respondent claims the right under Rule 23 to represent his class in this action. Contrary to petitioners (Pet. 11),

the denial of that right by the District Court gives him appellate "standing".

Respondent's grievance is aggravated by the destructive effect of the District Court's order on his and his fellow class members' substantive rights. As the Court of Appeals held, the District Court's nonclass suit ruling "will irreparably harm Eisen and all others similarly situated for * * * it will for all practical purposes terminate the litigation" (A16). Respondent's standing to vindicate those rights by appeal is plain.

Petitioners (Pet. 11) are less than candid in invoking *Lipsett* v. *United States*, 359 F. 2d 956 (2 Cir. 1966), for their opposing view. The court there dismissed an appeal from an order striking class suit allegations in a "spurious" class action *under old Rule 23* (prior to the July 1, 1966 amendment), but was careful to point out that the "new Rule 23 * * * is another matter" (pp. 958-9, notes 1 and 2). The District Court decision here was, of course, under the new Rule (A4-6).

Since petitioners assert a conflict between the decision below and *Lipsett* (Pet. 16), the differences between the old and new Rules for appeal purposes are worth noting. Under old Rule 23, a spurious class plaintiff actually represented nobody because a judgment in his action did not affect absent class members.* As was held in *Lipsett* and its predecessor, *All American Airways* v. *Elderd*, 209 F. 2d 247, 248-9 (2 Cir. 1954), a spurious class suit was simply "an invitation to others affected to join in the battle", i.e., to intervene; an order striking the class suit allegations did "not ruin the invitation"; hence it did "not prejudice anyone" and was not appealable.

---

* See the cases cited by the District Court (A4) and *Fox* v. *Glickman Corp.*, 355 F. 2d 161, 163 (2 Cir. 1965), cert. den. 384 U.S. 960; 3 *Moore's Fed. Pr.* (2d Ed. 1964), ¶ 23.11(3), p. 3465.

By contrast, new Rule 23 makes the plaintiff in a class suit formerly called "spurious" a true representative of the class since a judgment in his action, whether favorable or adverse, is res judicata for and against all absent class members who have not made a timely request for exclusion; Rule 23(c)(2) and (3). The effect of a nonclass suit determination under the new Rule is thus more than just "esthetic", as it was under the old (*Lipsett*, 359 F. 2d at 959); it destroys the plaintiff's right to represent the absent class members, and it destroys the latter's right to share in the benefits of a favorable judgment. This is the very kind of prejudice which, under the rationale of *Lipsett*, gives the aggrieved plaintiff standing to appeal.

III

The decision below is not in conflict with any other Court of Appeals ruling.

Petitioners assert (Pet. 14-17) that the decision below is in conflict with six earlier decisions, three from the Second and one each from the Seventh, Eighth and Ninth Circuits. All six, however, were decided under old Rule 23 and have, therefore, as just shown, no bearing on appeals under the amended Rule.*

---

* The Court below also noted (A15-16) that one of the six cases, *Oppenheimer* v. *F. J. Young & Co.*, 144 F. 2d 387 (2 Cir. 1944), was decided prior to the development of the collateral order doctrine in *Cohen* (337 U.S. 541). The same is true of two others, *Jumps* v. *Leverone*, 150 F. 2d 876 (7 Cir. 1945), and *Lockwood* v. *Hercules Powder Co.*, 172 F. 2d 775 (8 Cir. 1949). While *Rogers* v. *Alaska Steamship Co.*, 249 F. 2d 646 (9 Cir. 1957), came after *Cohen*, its requirement of a judgment "final not only as to all the parties, but as to the whole subject-matter" (pp. 648-9) totally ignored the collateral order doctrine. Finally, *Lipsett, supra* (359 F. 2d 956), construing *Elderd, supra* (209 F. 2d 247), expressly warned against extending its doctrine to appeals under the new Rule 23:

IV

The petition raises no question concerning the proper construction of amended Rule 23.

Petitioners urge that the importance of proper construction of a new federal rule calls for the grant of certiorari (Pet. 18). The decision below, however, does not involve any interpretation of amended Rule 23. That interpretation will not come until the Court of Appeals passes on the merits of the appeal.

Petitioners in effect propose that this Court grant two successive writs concerning this appeal: the first to test appellate jurisdiction, the second to review the proper interpretation of Rule 23. We submit that the jurisdictional question may well be postponed until this Court determines whether it wishes to hear the merits of the class suit controversy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM E. HAUDEK,
295 Madison Avenue,
New York, N. Y. 10017;

ROBERT ZICKLIN
521 Fifth Avenue,
New York, N. Y. 10017,
Attorneys for Respondent.

Of Counsel:

POMERANTZ LEVY HAUDEK & BLOCK,
LAVENTHALL & ZICKLIN.

April 19, 1967.